80-5179

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IN THE

UNITED STATES SUPREME COURT

WILLIE MAE JOHNSON	)	
	)	
Petitioner	)	
	)	
v.	)	Cause No.
	)	
STATE OF MISSOURI	)	
	)	
Respondent	)	

APPLICATION FOR LEAVE TO PROCEED AS A POOR PERSON

Comes now Christelle M. Adelman-Adler, on behalf of Petitioner, Willie Mae Johnson, and informs the Court that the Petitioner was found to be an indigent at the time she was arraigned on the charges which lead to the conviction which is the subject of her petition for Writ of Certiorari. The trial court granted her leave to appeal as a poor person in the Missouri courts. She does not have the funds or the financial resources to secure the cost or pay the fees and expenses associated with her petition.

WHEREFORE, she respectfully prays that the Court grant her leave to proceed as a poor person.

Respectfully submitted,

Christelle M. Adelman-Adler

CHRISTELLE M. ADELMAN-ADLER
Attorney for Petitioner

Subscribed and sworn to before me this 6 day of August, 1980.

Barbara J. Ingemitro

Notary Public

My Commission Expires: 9/21/81

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v.	)	Cause No.
	)	
STATE OF MISSOURI	)	
	)	
Respondent	)	

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

CHRISTELLE M. ADELMAN-ADLER
Special Assistant
Public Defender
22nd Judicial Circuit
Room 63
Municipal Courts Building
1320 Market Street
St. Louis, MO 63103

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Motion for New Trial . . . . . (7)

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Letter from Clerk of Missouri Supreme Court indicating Petitioner's Motion for Rehearing overruled . . . . . (55)

IN THE

UNITED STATES SUPREME COURT

WILLIE MAE JOHNSON Petitioner	)	
v.	)	Cause No.
STATE OF MISSOURI Respondent	)	

PETITION

Willie Mae Johnson, Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri, which affirmed a ten year sentence imposed upon a conviction for Robbery First Degree. Such conviction was imposed after petitioner was acquitted on two counts of Felony-Murder, and subsequently retried for the Robbery, in the course of which the murders were alleged to have occurred. The petition is filed because the Supreme Court of Missouri erroneously ruled that the acquittals on Felony-Murder, of which the Robbery was an element, did not preclude a subsequent conviction for the Robbery under the Double Jeopardy Clause.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals is not reported. A copy of the opinion is included in the Appendix, beginning at page 13.

The opinion of the Supreme Court of Missouri is reported at 598 S.W.2d 123 (Mo. 1980). A copy of the opinion is included in the Appendix, beginning at page 37.

JURISDICTION

The opinion of the Supreme Court of Missouri, affirming the sentence imposed was filed on April 3, 1980, Appendix (37-50). A timely Motion for Rehearing was filed in the Supreme Court of Missouri, Appendix (52). That Court denied the application on May 13, 1980, Appendix (55). This petition is filed within 90 days of that date, and the Court's jurisdiction is invoked under 28 U.S.C. 1257.

QUESTION PRESENTED

Whether Petitioner's acquittals of Felony-Murder bar a subsequent prosecution and conviction for Robbery First Degree which was the felony during the course of which the felony-murders were alleged to have been committed.

AUTHORITES CITED

FEDERAL CASES

Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1960);

Blockburger v. U.S., 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932).

Brown v. Ohio, 432 U.S.161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977);

Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 (1977);

Iannelli v. U.S., 420 U.S. 770, 43 L.Ed.2d 616, 95 S.Ct. 1284 (1975);

In re Hans Nielson, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 672 (1889);

U.S. v. Jorn, 400 U.S. 470, 27 L.Ed.2d 543, 91 S.Ct. 547 (1971);

MISSOURI CASES

State v. Lane, 551 S.W.2d 900 (Mo.App. 1977);

State v. Campbell, 551 S.W.2d 940 (Mo.App. 1977);

State v. Johnson, 549 S.W.2d 627 (Mo.App. 1977);

State v. Carter, 535 S.W.2d 537 (Mo.App. 1976);

State v. Harley, 543 S.W.2d 288 (Mo.App. 1976);

State v. Owens, 486 S.W.2d 462 (Mo. 1972).

STATEMENT OF THE CASE

Page references in this writ will be made to two separate trial transcripts. References to pages appearing in the transcript of appellant's first trial will be denoted (T. A. ____). References to pages appearing in the transcript of appellant's second trial on this charge will be denoted (T. B. ____).

In January, 1977, petitioner, Willie Mae Johnson, was tried in the Circuit Court of the City of St. Louis Missouri on four charges. The substitute information in lieu of indictment charged petitioner with: Count I, Murder first degree of James Bell; Count II, Murder first degree of Gladys Gregg; Count III, Robbery first degree of James Bell, and Count IV, Robbery first degree of Gladys Gregg. (T. A. 2-6). During the trial the State entered a nolle prosequi as to Count III. (T. A. 287). Petitioner was acquitted of the felony-murders of both James Bell and Gladys Gregg. (T. A. 334). The jury could not reach a verdict on Count IV and the Court declared a mistrial as to that count (T. A. 333-334).

Petitioner filed her Motion to Dismiss Count IV on the grounds that any further proceeding violated petitioner's Fifth Amendment guarantee against double jeopardy. (T. A. 335, T. B. 10-11); (Appendix (6)). This motion was denied on February 4, 1977. (T. B. 11).

In March, 1977 the petitioner was again tried for the robbery first degree of Gladys Gregg and found guilty as charged. Punishment was assessed at ten years. (T. B. 302). Petitioner's Motion for New Trial again asserted that the subsequent trial of petitioner for for robbery first degree violates the Double Jeopardy Clause. (Appendix (7)). An appeal in forma pauperis was taken to the Missouri Court of Appeals. (Appendix (12)). On June 26, 1979, the Eastern District of the Missouri Court of Appeals found that the subsequent prosecution violated the double jeopardy provisions and ordered the conviction reversed and the petitioner discharged. (Appendix (13-19)). At the request of the State the cause was transferred to the Missouri Supreme Court. (Appendix (20-21)).

The Missouri Supreme Court held first that there was no danger of multiple punishment here because there was no conviction and therefore no punishment on either felony-murder; second, there was no immunity from reprosecution here because the mistrial was not intentionally triggered by the State; and third, the jury's acquittal of the felony-murder charges did not impliedly acquit petitioner of the underlying robbery. (Appendix (37-50)).

The testimony and evidence at both trials was the same. The facts are as follows:

On August 16, 1975, the bodies of Gladys Gregg and James Bell were found in their respective apartments at 3969 McPherson Avenue. (T. B. 40-49, 59). The apartments were on the same floor but separated only by a curtain hanging in a hallway. (T. B. 42-43, 45-46, 55, 58-60, 119). The victim Gladys Gregg's apartment was apparently ransacked. (T. B. 40-49). Various items of silver and a pillowcase were missing from Miss Gregg's apartment. (T. B. 89).

The items of silver were recovered from Sandra Ross and Ronnie Johnson, petitioner's brother, as the result of a surveillance of petitioner's residence on an unrelated matter. (T. B. 67-86). Also introduced were fingerprints identified as petitioner's found on items discovered in the apartment of James Bell. (T. B. 196-198). One fingerprint belonging to petitioner was also found on a beer can in Gladys Gregg's apartment. (T. B. 169).

Charlene DeLock testified she saw Sandra Ross at James Bell's apartment and two unidentified companions waiting in an auto nearby on the night in question. (T. B. 166).

On September 20, 1975, the petitioner and Sandra Ross were arrested together on Marcus Avenue. (T. B. 96-99). Petitioner was interrogated and she told the questioning officer that she did not recognize either the bodies of Bell or Gregg, nor did she recognize the building in which they lived. She stated she had never been there. (T. B. 156-157, 162-163).

On these facts the first jury found petitioner not guilty of the felony-murder of James Bell and Gladys Gregg; and on these facts the second jury found petitioner guilty of robbery first degree.

REASONS FOR GRANTING WRIT

The writ shoud be granted in order to address the issue presented above and raised on appeal relating to the question of whether an acquittal on felony-murder bars a subsequent prosecution for the underlying felony.

The importance of this question is due to the conflict between the Missouri Supreme Court's opinion in the instant case, that the double jeopardy clause is not violated when there is an acquittal on the felony-murder and a subsequent prosecution for the underlying felony and this Court's rule set out in Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054. The Missouri Supreme Court failed to discuss Harris v. Oklahoma, supra in its opinion in this case.

Although the State charged Willie Mae Johnson with conventional murder in the first degree, they elected to submit to the jury on the felony-murder theory. When the State submits on this theory the commission of the felony is submitted to the jury conjunctively with the fact of the homicide. Although it has been said that the underlying felony does not become "an element of the felony-murder..." State v. Lane, 551 S.W.2d 900, 908 (Mo.App. 1977) proof of the underlying felony or the attempt to perpetrate it eliminates the necessity for proving the "elements" of premeditation and deliberation otherwise required to support a conviction of murder in the first degree. State v. Owens, 486 S.W.2d 462 (Mo. 1972). State v. Harley, 543 S.W.2d 288 (Mo.App. 1976).

If a jury had found petitioner guilty of either murder, it would have had to have found her guilty of causing the death "in robbing Gladys Gregg." Under such circumstances, the application of the doctrine of Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054 (1977), would mandate reversal.

The jury here found petitioner not guilty of both felony-murders and therefore must have found her not guilty of robbing Gladys Gregg. Again Harris v. Oklahoma would mandate reversal.

The reasoning of the Missouri Court of Appeals citing Harris v. Oklahoma, supra, petitioner supports theory and is submitted to be the correct reasoning in this case.

In Harris, the defendant was convicted of felony-murder which occurred during the course of a robbery. He was thereafter tried and convicted of armed robbery. The words of the court at 433 U.S. 682, 53 L.Ed.2d 1056 are particularly apposite to the instant case:

> When as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one. In re Hans Nielsen, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 2221 (1977). '... [A] person [who] has been tried and convicted for a crime which has various incidents included in it, ... cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.' In re Nielsen, supra at 188, 33 L.Ed. 118, 9 S.Ct. 672.

It is true that where two charges arise out of a single act, there is no violation of the rule against double jeopardy if each offense requires proof of an element not required by the other. State v. Campbell, 551 S.W.2d 940, 942 (Mo.App. 1977); State v. Johnson, 549 S.W.2d 627, 631 (Mo.App. 1977); State v. Carter, 535 S.W.2d 537, 538 (Mo.App. 1976). However, in view of the fact that the state proceeded on the theory of felony-murder, the state submitted the issue of robbery to the jury, for the issue was at least one of the "incidents" of the murder charges for which she "cannot be a second time tried ... without being twice put in jeopardy for the same offense." Harris v. Oklahoma, supra. A direct analogy may be drawn between this case and Brown v. Ohio, 432 U.S. 161, 53 L.Ed.2d 187 (1977), in which it was held that the double jeopardy clause of the Fifth Amendment, applied to the states through the Fourteenth Amendment, prevented a subsequent prosecution for auto theft after a conviction of a lesser offense of joyriding. For purposes of this determination, the following two quotations are particularly illuminating:

> The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in Blockburger v. United States, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932):
>
> > 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. ...'

> This test emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. ...' Iannelli v. United States, 420 U.S. 770, 785 n 17, 43 L.Ed.2d 616, 95 S.Ct. 1284 (1975).
>
> * * *
>
> Applying the Blockburger test, we agree with the Ohio Court of Appeals that joyriding and auto theft, as defined by that court, constitute 'the same statutory offense' within the meaning of the Double Jeopardy Clause. App 23. For it is clearly not the case that 'each [statute] requires proof of a fact which the other does not.' 284 U.S. at 304, 76 L.Ed. 306, 52 S.Ct. 180. As is invariably true of a greater and lesser included offense, the lesser offense -- joyriding -- requires no proof beyond that which is required for conviction of the greater -- auto theft. The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it.
>
> Id., 432 U.S. 168, 53 L.Ed. 195-196.

In the instant case, each and every element of the crime of robbery was submitted to the jury in the first trial in connection with the murder charges. Under the circumstances and in the interest of finality, the state cannot properly hale the petitioner before a new jury and relitigate the question of whether she was guilty of the robbery alone. Cf. Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469 (1969) and United States v. Jorn, 400 U.S. 470, 27 L.Ed.2d 543, 553 (1971).

This writ should be granted so that the Missouri Supreme Court's opinion which is contrary to the standard set forth in Harris v. Oklahoma, supra, will not operate to deny petitioner the federally protected right against twice being put in jeopardy for the same offense.

CONCLUSION

Petitioner respectfully prays for a Writ of Certiorari to review the opinion of the Missouri Supreme Court holding that a subsequent trial on the underlying felony after an acquittal on felony-murder does not violate the Double Jeopardy Clause.

Respectfully submitted,

CHRISTELLE ADELMAN-ADLER
Special Assistant
Public Defender
Attorney for Petitioner
22nd Judicial Circuit
Municipal Courts Building
1320 Market Street
St. Louis, MO 63103

APPENDIX

Applicable Missouri Statutes . . . . . (1)

Jury Instructions in Trial Court . . . . . (2)

Motion to Dismiss . . . . . (6)

Motion for New Trial . . . . . (7)

Notice of Appeal to the Missouri Court of Appeals . . . . . (12)

Opinion of Missouri Court of Appeals . . . . (13)

Respondent's Motion for Rehearing or Transfer To Supreme Court . . . . . (20)

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Petitioner's Motion for Rehearing . . . . . (52)

Letter from Clerk of Missouri Supreme Court indicating Petitioner's Motion for Rehearing overruled . . . . . (55)

REVISED STATUTES

of the

STATE OF MISSOURI

1969

559.010. Murder in the first degree.--Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, and perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree.

560.120. Robbery in first degree.--Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

560.135. Armed robbery--punishment for robberies.--Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon shall suffer death, or be punished by imprisonment in the pentitentiary for not less than five years, and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment in the penitentiary for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment in the penitentiary not exceeding five nor less than three years; every person convicted of robbery in the third degree shall be punished by imprisonment in the penitentiary not exceeding five years.

INSTRUCTION NO. 5

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about August 16, 1975, in the City of St. Louis, State of Missouri, the defendant, acting with another, caused the death of James Bell by binding and gagging him thereby causing suffication of him, and

Second, that she did so in robbing Gladeys Gregg, and

Third, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs,

then you will find the defendant guilty under Count I of murder in the first degree.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, you must find the defendant not guilty under Count I of that offense.

"Robbery" is the unlawful taking of the property of another from his person or in his presence and against his will either by the use of violence to the person of the possessor of such property with intent to steal or by putting him in fear of immediate injury to his person with intent to steal.

If you do find the defendant guilty under Count I of murder in the first degree you will fix her punishment at life imprisonment.

MAI-CR 6.19 Modified by 2.12

Submitted by State

APPENDIX (2)

INSTRUCTION NO. 7

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about August 16, 1975, in the City of St. Louis, State of Missouri, the defendant, acting with another, caused the death of Gladeys Gregg by binding and gagging her thereby causing suffication of her, and

Second, that she did so in robbing Gladeys Gregg, and

Third, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs,

then you will find the defendant guilty under Count II of murder in the first degree.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, you must find the defendant not guilty under Count II of that offense.

"Robbery" is the unlawful taking of property of another from his person or in his presence and against his will either by the use of violence to the person of the possessor of such property with intent to steal or by putting him in fear of immediate injury to his person with intent to steal.

If you do find the defendant guilty under Count II of murder in the first degree you will fix her punishment at life imprisonment.

MAI-CR 6.19 Modified by 2.12

Submitted by State

INSTRUCTION NO. 9

(Submitted at First Trial)

As to Count IV, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about August 16, 1975, in the City of St. Louis, State of Missouri, Gladeys Gregg owned a quantity of silverware, and

Second, that at that time and place the defendant, acting with another, took the property from Gladeys Gregg against her will by violence to her person, and

Third, that the defendant, acting with another, took the property with the intent to permanently deprive Gladeys Gregg of the property and to convert it or any part of it to the use of the defendant and another, and

Fourth, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs,

then you will find the defendant guilty under Count IV of robbery in the first degree.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, you must find the defendant not guilty of that offense.

If you do find the defendant guilty under Count IV of robbery in the first degree, you will fix her punishment at imprisonment by the Department of Corrections for a term fixed by you, but not less than five years nor more than life imprisonment.

MAI-CR 7.60 Modified by 2.12

Submitted by State

INSTRUCTION NO. 6
(Submitted at Second Trial)

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about August 16, 1975 in the City of St. Louis, State of Missouri, Gladys Gregg owned various articles of silverware, and

Second, that at that time and place the defendant, acting with others, took the property from Gladys Gregg against her will by violence to her person and by causing her to fear immediate injury to her person, and

Third, that the defendant, acting with others, took the property with the intent to permanently deprive Gladys Gregg of the property and to convert it or any part of it to the use of the defendant and others, and

Fourth, that the defendant acted either alone or knowingly and with common purpose together with others in the conduct referred to in the above paragraphs,

then you will find the defendant guilty of robbery in the first degree.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, you must find the defendant not guilty of that offense.

If you do find the defendant guilty of robbery in the first degree, you will fix his punishment at imprisonment by the Department of Corrections for a term fixed by you, but not less than five years nor more than life imprisonment.

MAI-CR 7.60 Modified by 2.12

Submitted by State

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

IN THE CIRCUIT COURT IN AND FOR THE CITY OF ST. LOUIS

STATE OF MISSOURI

STATE OF MISSOURI	)	
Plaintiff	)	
v.	)	No. 75-2893
WILLIE MAE JOHNSON	)	Division No. 16
Defendant	)	

FILED
FEB 2 1977
GEORGE M. SOLOMON
Clerk Circuit Court for City of St. Louis

MOTION TO DISMISS

Comes now the Defendant herein, Willie Mae Johnson, and moves the Court to dismiss this proceeding because she has heretofore been tried and acquitted of two charges arising out of the same incident or transaction on which Defendant stands charged at the present time.

The previous judgments of acquittal determined the ultimate facts which the State is attempting to relitigate in a further lawsuit.

The rule of collateral estoppel embodied in the Fifth Amendment guarantee against double jeopardy prohibits Defendant's retrial in this cause.

WHEREFORE, the Defendant requests this Court enter an order dismissing the charge in this cause for the reason that it violates Defendant's Fifth Amendment guarantee against double jeopardy.

Further, Defendant requests the Court enter an order requiring the official court reporter who took the testimony in the former trial to prepare a record of the prior proceedings so that this Court may make a decision in this matter. Defendant prays that the order provide the preparation of the transcript be without cost to the Defendant because she is indigent and unable to afford to pay court costs of such a transcript.

Respectfully submitted,

CHRISTELLE ADELMAN-ADLER
Assistant Public Defender

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

APR 15 1977

GEORGE M. SOLOMON
Clerk Circuit Court for Criminal Causes

IN THE CIRCUIT COURT IN AND FOR THE CITY OF ST. LOUIS

STATE OF MISSOURI

STATE OF MISSOURI, Plaintiff	)	Cause No. 75-2893
vs.	)	Division No. 19
WILLIE MAE JOHNSON, Defendant	)	

MOTION FOR NEW TRIAL

Comes now the defendant herein, Willie Mae Johnson, and moves the Court to set aside the verdict and judgment heretofore rendered in the aforesaid cause and requests the Court that a new trial be granted to him and in support of same request respectfully states to the Court as follows:

1. The Court erred in overruling defendant's Motion to Suppress Evidence and in overruling defendant's objection at trial to the introduction of numerous pieces of silverware and two pillowcases on the grounds that this physical evidence was obtained by a search and seizure which was made without a warrant and without other lawful authority, and in a manner which violated the defendant's rights under Section 15 of Article I of the Constitution of Missouri and the Fourth and Fourteenth Amendments of the Constitution of the United States.

2. The Court erred in overruling the Motion to Suppress defendant's statement and the objection at trial to the introduction of the statement for the reason that the statement was involuntarily made, it was the fruit of an illegal arrest, it was made without adequate advice concerning defendant's right to counsel and her right to remain silent, and that they were made without an intelligent waiver of her rights.

3. The Court erred in overruling defendant's Motion for Judgment of Acquittal at the close of State's and entire

case because the State failed to produce evidence which if admissible constituted a submissible case of a robbery first degree committed against Gladys Gregg.

4. The Court erred in allowing the State to adduce evidence of defendant's fingerprints found in James Bell's apartment in the trial of the case wherein Gladys Gregg was the victim. The evidence was not relevant to the charge under consideration and the charges based on the evidence found in James Bell's apartment and relating to James Bell had previously been disposed of in favor of the defendant. The introduction of this evidence violated defendant's rights to due process of law and a fair and impartial trial.

5. The Court erred in failing to sustain defendant's motion to dismiss the charge of robbery first degree committed against Gladys Gregg for the reason that a jury had previously determined the issues in the case in favor of the defendant. The same evidence which had been heard at the first trial was represented constituting a violation of defendant's right against double jeopardy and collateral estoppel. The defendant therefore was denied due process of law.

6. The Court erred in admitting Exhibits 16, 17, 2, 3, 4, 5, 6, and 25 because they were irrelevant to the charge under consideration. The defendant was denied due process of law and a fair and impartial trial by the introduction of these exhibits.

7. The Court erred in allowing the introduction of the two boxes found in James Bell's apartment as evidence in this case because they were irrelevant and no evidence was presented to show that these boxes belonged in Bell's apartment nor that they were inaccessible to the defendant in the past. Further, the exhibits were irrelevant and introduced to show the defendant's alleged involvement in another offense of which she had previously been acquitted. The defendant was thereby denied her rights against double

jeopardy, collateral estoppel, due process of law and a fair and impartial trial.

8. The Court erred in overruling defendant's objection in final argument to the Assistant Circuit Attorney's statement that whoever perpetrated the crime(s) on James Bell perpetrated the same crime against Gladys Gregg. This was prejudicial in that it inferred that the defendant had committed some crime against James Bell when in fact she had previously been acquitted of those charges and it was an attempt to inflame the jury with evidence of the homicides. This violated defendant's rights against double jeopardy, collateral estoppel, and her rights to due process of law and a fair and impartial trial.

9. The Court erred in overruling defendant's request for a mistrial during closing argument when the Assistant Circuit Attorney stated that he didn't have to prove defendant's guilt beyond all doubt. The Court had previously discussed with counsel the applicable law in this area which indicated that such a statement could not be made and no definition of beyond a reasonable doubt could be given. This argument showed total disregard for the previous ruling of the Court and denied defendant's rights to a fair and impartial trial and due process of law.

10. The Court erred in overruling defendant's request for a mistrial during closing argument when the Assistant Circuit Attorney eluded to the defendant's failure to produce witnesses or testify by saying, "You have heard of no witness to support her theory." This constituted a denial of due process of law and a fair and impartial trial.

11. The Court erred in failing to give Instruction No. A, the lesser included offense of stealing fifty dollars or over for the reason that the circumstantial evidence presented did not show that the silverware could only have been taken by force and violence from Gladys Gregg. Since no time of death was shown and the time of the theft of the items could not be determined, it was only speculative that the items were taken by means of force or fear. The failure

to give this instruction denied the defendant of due process of law and a fair and impartial trial.

12. The Court erred in failing to give Instruction No. B. This instruction was a proper statement of the law regarding an accessory after the fact. The jury could find that the defendant did not participate as a principle and that participation only as an accessory after the fact did not make her guilty as a principle. The failure to give this instruction denied the defendant's right to due process of law and a fair and impartial trial.

13. The Court erred in failing to give Instruction No. C which stated the standard applicable for determining whether evidence of similar acts could be used in determining defendant's guilt. Without an instruction guiding the jury on the law applicable they were allowed to consider evidence of offenses of which the defendant had previously been acquired. The failure to give a proper instruction onwhen "similar acts" can be considered as evidence denied the defendant a fair and impartial trial, due process of law, and violated her rights against collateral estoppel and double jeopardy.

14. The Court erred in giving Instruction No. 12, MAI-CR 3.60 as submitted by the State for the reason that this allowed the jury to consider evidence of other crimes on the basis that it showed a common scheme or plan. It was error for the Court to allow the jury to consider such evidence since the defendant had previously been acquitted of the other charges which allegedly constituted the "common" scheme or plan. This denied defendant's right to a fair and impartial trial and due process of law.

Your movant alleges that the above errors, taken individually and cumulatively, abridged defendant's rights as secured to him by the case law and Constitution of Missouri and the United States.

WHEREFORE, your movant respectfully prays this Honorable Court to set aside and hold for naught the finding and verdict of the jury and to discharge the movant or in the alternative if the Court concludes a submissible case was presented by the evidence then movant requests a new trial or such other relief as may be appropriate.

Respectfully submitted,

Christelle Adelman-Adler

Christelle Adelman-Adler
Assistant Public Defender

APPENDIX (11)

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

IN THE CIRCUIT COURT IN AND FOR THE CITY OF ST. LOUIS

STATE OF MISSOURI

STATE OF MISSOURI, Plaintiff	)	
vs.	)	Cause No. 75-2893
WILLIE MAE JOHNSON, Defendant	)	Division No. 19

NOTICE OF APPEAL TO THE MISSOURI COURT OF APPEALS

ST. LOUIS DISTRICT

Notice is given that Willie Mae Johnson, defendant herein appeals from the judgment entered in this cause on the 4th day of May, 1977.

Defendant was convicted of Robbery First Degree a felony, Section 560.120 and 560.135, RSMo 1969, which offense is not exclusively punishable by life imprisonment or death. This appeal does not involve a construction of the Constitution of the United States or the Constitution of the State of Missouri. The Missouri Court of Appeals has jurisdiction. Article V, Section 3, Constitution of Missouri, as amended 1970.

Permission to appeal as a poor person was granted by Hon. Judge Clyde Cahill, Judge, on the 2nd day of May 1977.

Christelle Abdelmassih
Assistant Public Defender
22nd Judicial Circuit
1320 Market Street
St. Louis, Missouri 63103

FILED
MAY 10 1977
GEORGE M. SOLOMON
Clerk Circuit Court for Criminal Causes

In the Missouri Court of Appeals

EASTERN DISTRICT

DIVISION TWO

State of Missouri, Respondent, v. Willie Mae Johnson, Appellant.

Cause No. 39,242

Appeal from the Circuit Court City of St. Louis

Hon. Clyde S. Cahill, Judge

OPINION FILED

June 26, 1979

Defendant was originally tried in January, 1977, on four charges: murder in the first degree of James Bell, murder in the first degree of Gladys Gregg, robbery of James Bell and robbery of Gladys Gregg. She was acquitted on both counts of murder. The state entered a nolle prosequi for the robbery of James Bell. The jury could not reach a verdict as to the robbery of Gladys Gregg, and the court declared a mistrial on that count. In March 1977, defendant was tried again for the robbery of Gladys Gregg. She was convicted by the jury on that charge, §560.120, RSMo 1969, and sentenced by the court to ten years' imprisonment.

On appeal defendant raises three points. She contends that the trial court erred in denying her motion to dismiss the robbery charge because a second prosecution on that charge constituted double jeopardy, that the trial court erred in denying her motion to suppress evidence because she had standing to challenge the legality of the search and seizure by which the evidence was obtained, and that the trial court erred in denying her motion for judgment of acquittal at the close of the case because the evidence was insufficient to submit the case to the jury. Finding merit in defendant's first point, we reverse and order the defendant discharged. A brief st

uffice.

On the night of August 16, 1975, the apartment of Gladys Gregg as ransacked and she was robbed of a substantial amount of silverware hich she had collected over the years. The apartment was located at 969 McPherson in the City of St. Louis and consisted of the front three ooms of the first floor. Mrs. Gregg's body, bound hand and foot with lectrical cord, was found on the morning of August 17, 1975, lying ext to her bed. At the time of her death, she was seventy-five years ld and an invalid. The rear three rooms of the first floor comprised he apartment of James Bell. He also was found dead, his hands bound ehind him, his feet bound and his head wrapped in a plastic bag. He as lying on his bed, face down. The two apartments were separated by nly a curtain in a hallway; both apartments were in disarray.

Defendant's fingerprints were found on a beer can recovered from he premises, on a blue plastic box and on a check box located in ell's apartment.

A tenant of a basement apartment at 3969 McPherson, Charlene Deloch, estified that she had last seen Mrs. Gregg alive at about 7:30 p.m. on ugust 16, 1975. Ms. Deloch then left the premises for several hours. pon her return at about 10:30 p.m., she encountered Sandra Ross, whom eloch had known since Ross was a child. Sandra was walking around oward the rear of the building and the door of Mr. Bell's apartment. hey conversed briefly before Sandra knocked on the door of Mr. Bell's partment and was admitted. Ms. Deloch saw a dark colored automobile ccupied by two persons parked near the side of the building. She ould not see them well enough to determine whether they were male or emale. Ms. Deloch entered her own apartment; and, in about thirty inutes, Sandra Ross "hollered in my window and told me she would see e in the morning", a promise which was not kept. Ms. Deloch had seen andra at Mr. Bell's apartment approximately four times previous to his occasion and understood they were friends.

On the day after Mrs. Gregg and Mr. Bell were found dead, August 18,

surveillance of the premises at 4752 Ashland, defendant Willie Mae Johnson's residence at the time. As they watched, a man and a woman - defendant's brother, Ronnie Johnson and Sandra Ross - walked out of the house carrying pillowcases filled with items and entered an automobile. Since neither of the persons was the object of the surveillance, the detectives did not confront them but placed a radio call to Sergeant Charles McCrary who was parked several blocks away as a backup to the detectives. At their request, McCrary stopped the vehicle, a black over maroon 1968 or 1969 Pontiac, driven by Ronnie Johnson. On the floorboard in front of Sandra Ross were two pillowcases containing numerous articles of silverware in plain view. McCrary seized the silverware and took Ronnie Johnson and Sandra Ross to police headquarters for questioning. The pillowcases were identified by Mrs. Gregg's maid as belonging to the victim. The silverware in the pillowcases was identified by both the maid and Mrs. Gregg's stepson as belonging to Mrs. Gregg.

At 1:00 a.m. on September 20, 1975, St. Louis Police detectives maintaining a surveillance at 2714 Marcus observed Sandra Ross and defendant Johnson alight from an automobile. The detectives approached the two women and identified themselves as police officers, whereupon the women attempted to flee. The officers gave chase, apprehended the women and took them into custody. Having been read her Miranda rights, defendant stated to an investigating officer that she did not recognize photographs of the premises at 3969 McPherson, that she had never been to those premises, that she did not know Gladys Gregg or James Bell or recognize their names. She also stated that she and Sandra Ross were lovers.

The "substitute information in lieu of indictment" upon which defendant was tried the first time charged that she, acting with another, feloniously, willfully, premeditatedly, deliberately, on purpose and of her malice aforethought did make an assault upon one Gladys Gregg, with a plastic bag, and then and there feloniously, willfully, premedi-

tatedly, deliberately, on purpose and of her malice aforethought did strangle and suffocate the body of the said Gladys Gregg ..." thus causing her death. However, at the conclusion of the trial and over defense counsel's objection, the trial court refused to give a "conventional murder first degree" instruction. Rather, the murder charges were submitted to the jury under the felony-murder doctrine, thus directing the jury to find defendant guilty of the murders of James Bell and Gladys Gregg if it found that she caused the death of each victim "and, Second, that she did so in robbing Gladys Gregg, ..."[1] As pointed out above, defendant was acquitted of both of the murder charges.

After a mistrial was declared as to the charge of robbery of Gladys Gregg, defendant filed a motion to dismiss the charge, alleging that a re-trial on such charge would violate defendant's right against double jeopardy. The motion was denied by the trial court. After the second trial, the point was properly preserved in the motion for new trial.

1. Except for the name of the deceased, both instructions are identical. The one hypothesizing the death of Gladys Gregg reads as follows:

> "As to Count II, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about August 16, 1975, in the City of St. Louis, State of Missouri, the defendant, acting with another, caused the death of Gladys Gregg by binding and gagging her thereby causing suffocation of her, and
>
> Second, that she did so in robbing Gladys Gregg, and
>
> Third, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs, then you will find the defendant guilty under Count II of murder in the first degree.
>
> However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, you must find the defendant not guilty under Count II of that offense.
>
> 'Robbery' is the unlawful taking of property of another from his person or in his presence and against his will either by the use of violence to the person of the possessor of such property with intent to steal or by putting him in fear of immediate injury to his person with intent to steal.
>
> If you do find the defendant guilty under Count II of murder in the first degree you will fix her punishment at life imprisonment."

Under the peculiar circumstances of this case, we believe that defendant's right not to be put in jeopardy twice for the same offense was violated by her second trial for the robbery of Mrs. Gregg.

In the first trial, the state elected to submit to the jury on the theory of felony-murder although defendant had been charged with conventional murder in the first degree. It is, of course, permissible for the state to plead conventional first degree murder and then to prove and submit felony-murder. State v. Owens, 486 S.W. 2d 462, 467[7](Mo. 1972); State v. Harley, 543 S.W. 2d 288, 293 (Mo. App. 1976). However, when it does so, the commission or attempted commission of one of the felonies enumerated in §559.010, RSMo 1969, is submitted to the jury conjunctively with the fact of the homicide. Although it has been said that the underlying felony does not become "an element of the felony-murder ...," State v. Lane, 551 S.W. 2d 900, 908 (Mo. App. 1977), proof of the underlying felony or the attempt to perpetrate it eliminates the necessity for proving the "elements" of premeditation and deliberation otherwise required to support a conviction of murder in the first degree. State v. Owens, supra, 466; State v. Harley, supra, 293.

In order for the jury to have found defendant guilty of either murder, it would have had to have found her guilty of causing the death "in robbing Gladys Gregg." Under such circumstances, we believe that application of the doctrine of Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed. 2d 1054 (1977), mandates reversal. In Harris, the defendant was convicted of felony-murder which occurred during the course of a robbery. He was thereafter tried and convicted of armed robbery. The words of the court at 433 U.S. 682, 683, 53 L.Ed. 2d 1056 are particularly apposite to the instant case:

> "When as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one. In re Hans Nielsen, 131 US 176, 33 L Ed 118, 9 S Ct 672 (1889); cf. Brown v Ohio, 432 US 161, 53 L Ed 2d 187, 97 S Ct 2221 (1977). '... [A] person [who] has been tried and convicted for a crime which

has various incidents included in it, ... cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence.' In re Nielsen, supra, at 188, 33 L Ed 118, 9 S Ct 672."

It is true that where two charges arise out of a single act, there is no violation of the rule against double jeopardy if each offense requires proof of an element not required by the other. State v. Campbell, 551 S.W. 2d 940, 942 (Mo. App. 1977); State v. Johnson, 549 S.W. 2d 627, 631 (Mo. App. 1977); State v. Carter, 535 S.W. 2d 537, 538 (Mo. App. 1976). However, in view of the posture in which we find this case, the state can derive no benefit from this rule. By proceeding on the theory of felony-murder, the state submitted the issue of robbery to the jury, for the issue was at least one of the "incidents" of the murder charges for which she "cannot be a second time tried ... without being twice put in jeopardy for the same offence." Harris v. Oklahoma, supra. A direct analogy may be drawn between this case and Brown v. Ohio, 432 U.S. 161, 53 L.Ed. 2d 187 (1977), in which it was held that the double jeopardy clause of the fifth amendment, applied to the states through the fourteenth, prevented a subsequent prosecution for auto theft after a conviction of a lesser offense of joyriding. For our purposes, the following two quotations are particularly illuminating:

"The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in Blockburger v. United States, 284 US 299, 304, 76 L Ed 306, 52 S Ct 180 (1932):

'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. ...'

This test emphasizes the elements of the two crimes. 'If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. ...' Iannelli v. United States, 420 US 770, 785 n 17, 43 L Ed 2d 616, 95 S Ct 1284 (1975)." Id., 432 U.S. 166, 53 L.Ed. 2d 194.

* * *

"Applying the Blockburger test, we agree with the Ohio Court of Appeals that joyriding and auto theft, as defined by that court, constitute 'the same statutory offense' within the meaning of

the Double Jeopardy Clause. App 23. For it is clearly not the case that 'each [statute] requires proof of a fact which the other does not.' 284 US, at 304, 76 L Ed 306, 52 S Ct 180. As is invariably true of a greater and lesser included offense, the lesser offense—joyriding—requires no proof beyond that which is required for conviction of the greater—auto theft. The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." Id., 432 U.S. 168, 53 L.Ed. 2d 195-196.

In the instant case, each and every element of the crime of robbery was submitted to the jury in the first trial in connection with the murder charges. Under the circumstances and in the interest of finality, the state could not properly hale defendant before a new jury and relitigate the question of whether she was guilty of the robbery alone. Cf. Ashe v. Swenson, 397 U.S. 436, 25 L.Ed. 2d 469 (1969) and United States v. Jorn, 400 U.S. 470, 479, 27 L.Ed 2d 543, 553 (1971).

The judgment of conviction is reversed, and the appellant is ordered discharged.

Albert J. Stephan, Jr.
ALBERT J. STEPHAN, JR., PRESIDING JUDGE

Joseph G. Stewart JUDGE Concurs

John J. Kelly, Jr. JUDGE Concurs

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	Cause No. 39242
	)	
WILLIE MAE JOHNSON,	)	
	)	
Appellant.	)	

MOTION FOR REHEARING

OR TRANSFER TO SUPREME COURT

Pursuant to Rule 83.02 and 84.17, V.A.M.R., comes now the State of Missouri, respondent in the above-captioned cause, by and through its attorneys, John Ashcroft, Attorney General, and Weldon W. Perry, Jr., Assistant Attorney General, and moves this court to withdraw its opinion heretofore rendered in this cause and grant respondent a rehearing of said cause or in the alternative transfer it to the Supreme Court of Missouri. As grounds for the granting of said motion, respondent submits that:

1. The court's opinion as entered in this cause on June 26, 1979, conflicts with the opinion entered by this court on May 9, 1979, in State of Missouri v. Dennis Lee Morgan, Cause No. 39358, and the opinion entered by the Missouri Supreme Court in State v. Chambers, 524 S.W.2d 826, 829 (Mo. banc 1975);

2. There is a question of general interest or importance involved in the case; and

3. The court's opinion as entered overlooks or misinterprets material matters of law or fact, as is more fully detailed in the suggestions in support of this motion attached hereto and incorporated by reference herein.

WHEREFORE, respondent prays that this court withdraw its opinion heretofore rendered in this cause and grant respondent a rehearing in order that the matters adverted to above may be

more fully and properly presented to this court for its consideration, or in the alternative order this cause be transferred to the Supreme Court of Missouri.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

Weldon W. Perry, Jr.

WELDON W. PERRY, JR.
Assistant Attorney General

Post Office Box 899
Jefferson City, Missouri 65102
314/751/3321

Attorneys for Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 6 day of July, 1979, to:

Mr. Robert C. Babione
Public Defender
Twenty-Second Judicial Circuit
1320 Market Street
St. Louis, MO
Attorney for Appellant.

Weldon W. Perry, Jr.
WELDON W. PERRY, JR.

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	Cause No. 39242
	)	
WILLIE MAE JOHNSON,	)	
	)	
Appellant.	)	

SUGGESTIONS IN SUPPORT OF RESPONDENT'S

MOTION FOR REHEARING OR TRANSFER TO SUPREME COURT

Comes now the State of Missouri, respondent in the above-captioned cause, by and through its attorneys, John Ashcroft, Attorney General, and Weldon W. Perry, Jr., Assistant Attorney General, and in support of its motion for rehearing or transfer to Supreme Court, does submit the following suggestions for this court's consideration:

In an opinion filed in this cause on June 26, 1979, reversing appellant's robbery conviction under Section 560.120, RSMo 1969, this court opined:

> "In order for the jury to have found defendant guilty of either murder, it would have had to have found her guilty of causing the death 'in robbing Gladys Gregg.' Under such circumstances, we believe that application of the doctrine of Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054 (1977), mandates reversal. . . .
>
> * * *
>
> . . . By proceeding on the theory of felony-murder, the state submitted the issue of robbery to the jury, for the issue was at least one of the 'incidents' of the murder charges for which she 'cannot be a second time tried. . . without being twice put in jeopardy for the same offense.' [Citation Omitted]." (Court's Opinion at pages 5 and 6).

As entered, the court's opinion in this cause is contrary to Missouri law as pronounced by this court in State of Missouri v. Dennis Lee Morgan, Missouri Court of Appeals, Eastern District, (Cause No. 39358, May 9, 1979). Furthermore, the opinion as entered is contrary to the decision entered by the Missouri Supreme Court in State v. Chambers, 524 S.W.2d 826, 829 (Mo. Banc 1975) cert. denied 423 U.S. 1058 (1976). In Morgan, supra, this court

dealth specifically with the issue of whether or not the Fifth Amendment's double-jeopardy clause proscribes prosecuting, convicting and sentencing a criminal defendant for both felony-murder [murder in the second degree] and the underlying felony [stealing over $50]. Quoting from State v. Chambers, supra, this court in Morgan, opined:

> "After analyzing some general principles of the doctrine of double jeopardy, the court phrased the issue in Chambers, at page 829, as:
>
> [W]hether, in the circumstances of this case, the stealing charge is an essential element of, or lesser included offense within, the felony-murders as to bring the case within the prohibition of State v. Toombs, supra, [326 Mo. 981, 34 S.W. 2d 61 (1930)] [that a defendant may not be tried twice for the same offense].
>
> The key to the court's holding that the multiple convictions did not violate the provisions against double jeopardy is found in its conclusion that the underlying felony is only evidence of the mental state necessary to support conviction for the resulting murder and is not an actual element of the murder offense. 'The [felony-murder] rule does not make the underlying felony an element of the felony-murder; it merely provides an additional means of proving the requisite felonious intent for murder. [Citing cases].' . . .
>
> Chambers is directly on point and controls the factual situation presented here. This court is constitutionally bound to follow the last controlling opinion of the Supreme Court of Missouri. [Citations omitted]."

In reversing appellant's conviction in the instant case, this court has failed to acknowledge or distinguish existing Missouri authorities which have repeatedly recognized that a murder and a robbery arising out of the same transaction or occurrence are not to be construed either as constituting the same offense or emanating one from another for purposes of ascertaining the existence of

double jeopardy. State v. Moore, 33 S.W.2d 905, 906-907 (Mo. 1930); State v. Chambers, supra, at 829; State v. Dennis Lee Morgan, Missouri Court of Appeals, Eastern District, Cause No. 39358.

WHEREFORE, under the above and foregoing authorities, respondent respectfully excepts to the majority opinion entered in this cause and requests that this court either grant a rehearing or in the alternative order the cause transferred for hearing before the Supreme Court of Missouri.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

Weldon W. Perry, Jr.

WELDON W. PERRY, JR.
Assistant Attorney General

Post Office Box 899
Jefferson City, Missouri 65102
314/751/3321

Attorneys for Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 6 day of July, 1979, to:

Mr. Robert C. Babione
Public Defender
Twenty-Second Judicial Circuit
1320 Market Street
St. Louis, MO 63101
Attorney for Appellant.

Weldon W. Perry, Jr.
WELDON W. PERRY, JR.

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI, Respondent,	)	
v.	)	Cause No. 39242
WILLIE MAE JOHNSON, Appellant.	)	

MOTION FOR TRANSFER

Comes now the State of Missouri, respondent in the above-entitled cause, by and through its attorneys, John Ashcroft, Attorney General of Missouri, and Weldon W. Perry, Jr., Assistant Attorney General, and pursuant to Rule 83.03, V.A.M.R., respectfully moves this Court to grant a hearing on transfer of this cause after opinion by the Missouri Court of Appeals, Eastern District. In support of this motion, and as grounds for the granting thereof, respondent submits:

1. That appellant was convicted in the Circuit Court for the City of St. Louis of robbery in violation of Section 560.120, RSMo 1969.

2. That on direct appeal of the aforementioned conviction to the Missouri Court of Appeals, Eastern District, that Court reversed appellant's conviction in an opinion filed June 26, 1979.

3. That the Missouri Court of Appeals, Eastern District, denied respondent's timely motion for rehearing or transfer to the Supreme Court on September 17, 1979.

4. That a hearing on transfer should be granted by the Supreme Court of Missouri in this cause, because: (1) The decision entered by the Court of Appeals is contrary to a controlling opinion by the Missouri Supreme Court; (2) the decision entered by the Court of Appeals is contrary to a previous decision of an appellate court of this state; and (3) there is a question of general interest or importance involved in the case, as is more specifically set forth in the suggestions in support of this motion.

WHEREFORE, respondent prays that this Court enter its order transferring this cause from the Missouri Court of Appeals, Eastern District, and granting respondent a hearing on transfer in order that the matters referred to above may be presented to this Court for its consideration.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

Weldon W. Perry, Jr.

WELDON W. PERRY, JR.
Assistant Attorney General

Post Office Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 24th day of October, 1979, to:

Mr. Robert C. Babione
Public Defender
Twenty-Second Judicial Circuit
1320 Market Street
St. Louis, MO 63101

Ms. Nancy Sachett
Chief Deputy Clerk
Missouri Court of Appeals
Civil Courts Building
12th & Market Streets
St. Louis, Missouri 63101

Weldon W. Perry, Jr.
WELDON W. PERRY, JR.

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI, Respondent,	)	
v.	)	Cause No. 39242
WILLIE MAE JOHNSON, Appellant.	)	

SUGGESTIONS IN SUPPORT OF MOTION FOR TRANSFER

Comes now respondent State of Missouri, by counsel, and in support of its motion to transfer does submit the following suggestions for the Court's consideration:

The operative facts from which this appeal arises are, as follows:

1. Appellant was originally tried in the Circuit Court for the City of St. Louis on four counts within the same information (Tr.A 2-6). Count II charged the felony-murder of Gladys Gregg (Tr.A 3-4), and Count IV charged the underlying robbery of Gladys Gregg (Tr.A 5-6).

2. Appellant was acquitted of the felony-murder charge (Tr.A 289,334). Due to irreconcilable differences of the jurors on the robbery charge, the Court declared a mistrial on that count (Tr. A 333-334).

3. Appellant's motion to dismiss the robbery count filed upon declaration of the mistrial was overruled (Tr.A 335-339).

4. Appellant was later tried in the Circuit Court for the City of St. Louis for the robbery of Gladys Gregg and was found guilty as charged with punishment assessed at ten years (Tr.B 302).

In an opinion filed June 26, 1979, the Missouri Court of Appeals, Eastern District, relying on Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054, reversed appellant's robbery conviction, holding:

> "In order for the jury to have found defendant guilty of either murder, it would have had to have found her guilty of causing the death 'in robbing Gladys Gregg.' Under

such circumstances, we believe that application of the doctrine of Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054 (1977), mandates reversal. . . .

* * *

By proceeding on the theory of felony-murder, the state submitted the issue of robbery to the jury, for the issue was at least one of the 'incidents' of the murder charges for which she 'cannot be a second time tried . . . without being twice put in jeopardy for the same offense.' [Citation omitted]." (Court of Appeals' Opinion at pages 5 and 6).

Respondent respectfully submits that the Court of Appeals' conclusion that Harris mandates reversal of appellant's robbery conviction under the "peculiar" circumstances of this case is erroneous both under Harris and under the current state of Missouri law as recently pronounced by the Supreme Court of Missouri. Initially, it should be noted that the Court's one page opinion in Harris held only that:

"When as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one. [Citations omitted]. '. . .[A] person [who] has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.'" Harris, supra at 682.

As is evidenced by reference to the above quotation, Harris determined only that when a person is convicted of a greater crime (murder) he cannot then be prosecuted for a lesser included offense (robbery with firearms) without violating the constitutional

guarantee against double jeopardy. Harris does not even purport to proscribe subsequent prosecution of an accused for the underlying felony (robbery) following the accused's acquittal of felony-murder. The Missouri Court of Appeals, Eastern District, has previously acknowledged Harris' inapplicability to Missouri felony-murder prosecutions in State v. Morgan, Cause No. 39358 (Slip Opinion, May 9, 1979, Missouri Court of Appeals, Eastern District). In Morgan, the Court of Appeals determined:

> "The first issue presented on appeal is whether the double jeopardy clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, forbids prosecuting, convicting and sentencing appellant for both felony-murder (murder in the second degree) and the underlying felony (stealing over $50).
>
> * * *
>
> Appellant relies primarily on Harris v. Oklahoma, 433 U.S. 682 (1977) which held a prosecution for robbery with firearms following a prosecution and conviction for felony murder in the same transaction violated the defendant's right not to be twiced placed in jeopardy for the same offense. . . .
>
> This holding, however, must be interpreted in light of the specific language of the Oklahoma statute involved. The statutory section, 21 O.S.A. § 701 provided: 'Homicide is murder in the following cases. . . . 3. When perpetrated without any design to effect death by a person engaged in the commission of any felony.'1
>
> Oklahoma thus made the underlying felony an element of the murder. The Supreme Court's 'greater crime' - 'lesser crime' analysis has no application to Missouri's case law which makes the underlying felony simply a means of proving one of the elements

of murder and not actually an element of the offense. [Citations omitted]." [Emphasis supplied]. (Morgan Slip Opinion, pages 2 and 3).

The decision entered by the Missouri Court of Appeals, Eastern District, in Morgan and the decision entered by that court in the instant case are conflicting and deserving of uniform resolution by this court under Rule 83.03, V.A.M.R.. This court has accepted Morgan on transfer from the Missouri Court of Appeals. Respondent submits that in view of the importance and similarity of the issues involved, the instant case should also be transferred for consideration by this Court.

Respondent submits that this case is controlled by the opinion entered by this Court in State v. Chambers, 524 S.W.2d 826, 831 (Mo. banc 1975), wherein it was determined:

> "In summary, where a homicide is prosecuted under the felony-murder rule, the other felony does not become, a fortiori, merged in or an element of the offense of murder, and the defendant may be prosecuted for both the homicide and the underlying felony without being twiced placed in jeopardy if the conviction of each offense requires proof of essential elements not required for conviction of the other."

Chambers holds that where a conviction of felony murder requires proof of essential elements not required for conviction on the underlying felony, an accused's double-jeopardy guarantee is not violated by prosecution for both offenses. Missouri courts have repeatedly recognized that a murder and a robbery arising out of the same transaction or occurrence are nonetheless comprised of different elements and therefore cannot be construed either as constituting the same offense or emanating one from another for purposes of double-jeopardy analysis. State v. Moore, 33 S.W.2d 905, 906-907 (Mo. 1930); State v. Hicks, 530 S.W.2d 396, 400-401 (Mo.App. St.L.D. 1975).

In State v. Bobbitt, 128 S.W. 953, 959-960 (Mo. 1910), the court was presented with a situation very similar to the case at

bar. In Bobbitt, the defendant was first charged and acquitted of first degree murder perpetrated during an attempted arson of the victim's house. He was subsequently charged and convicted of the attempted arson of the house. On appeal, the defendant alleged double-jeopardy because the state had proceeded in the murder prosecution on the theory that the defendant was guilty of first degree murder for killing the victim while burning or attempting to burn his house; therefore, the state should be barred from later prosecuting him for the attempted burning of the house (i.e. that the arson was the same arson charged and offered as evidence in the prior murder prosecution and therefore constituted a necessary element in the murder case). The court in Bobbitt held that acquittal on the murder charge was no bar to later prosecution of the defendant for the underlying attempted arson. The wisdom of applying the rule in Bobbitt, supra, to analogous situations has recently been recognized by this Court in State v. Chambers, supra, at 829.

The opinion entered by the Court of Appeals in this case inferentially finds that the jury's acquittal on the felony-murder charge necessarily determined appellant's innocence on the underlying robbery charge as well. One need only consider the attendant circumstances to realize the error of such logic. The jury acquitted appellant of the felony murder charge (Tr. A 334), but reached irreconcilable differences leading to a mistrial on the underlying robbery charge (Tr.A 333-334). The disparity in these two results clearly indicates that consideration of factors other than a determination of guilt or innocence relative to the underlying robbery charge prompted the jury's acquittal on the felony murder charge. If it were otherwise, the jury would have acquitted appellant of robbery as well. These facts certainly weigh against the propriety of the conclusion reached by the Court of Appeals that the underlying robbery charge constituted an "incident" of the felony murder charge for which appellant could not again be prosecuted without violating the constitutional guarantee against double-jeopardy. On the contrary, as aforementioned, this court has held that the underlying felony in a Missouri felony-murder prosecution does not constitute an element of the felony murder but, rather, is an additional means of proving the requisite

felonious intent for murder. Chambers, supra.

Finally, it is by now a well-settled proposition that retrial of a defendant following a prior mistrial on the same charge due to the prior jury's inability to reach a verdict does not constitute double-jeopardy unless the trial court abused his discretion in granting the mistrial. Logan v. U.S., 144 U.S. 263, 297-298, 12 S.Ct. 617, 36 L.Ed. 429 (1891); Durham v. Wyrick, 545 F.2d 41, 43-44 (8th Cir. 1976); Ward v. State, 451 S.W.2d 79, 81-82 (Mo. 1970). See also, Illinois v. Somerville, 410 U.S. 458, 467-468, 93 S.Ct. 1066, 35 L.Ed.2d 425, 433-434 (1973), wherein the court expressed distain at the practice of a trial court declaring a mistrial for the sole purpose of allowing a prosecutor to strengthen the state's case but recognized that the granting of a mistrial following a jury's inability to reach a verdict rested within the discretion of the trial court to be disturbed on appeal only in the event of abuse. It is submitted that the state's retrial of appellant after a prior mistrial for robbery under both the circumstances of this case and the foregoing authorities, did not constitute a violation of appellant's constitutional guarantee against double jeopardy.

WHEREFORE, for the above and foregoing reasons, respondent respectfully excepts to the opinion entered in this cause by the Missouri Court of Appeals, Eastern District, and requests that this Court enter its order transferring this cause for hearing before the Supreme Court of Missouri.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

Weldon W. Perry, Jr.

WELDON W. PERRY, JR.
Assistant Attorney General

Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 2nd day of October, 1979, to:

Mr. Robert C. Babione
Public Defender
Twenty-Second Judicial Circuit
1320 Market Street
St. Louis, MO 63101

Ms. Nancy Sachett
Chief Deputy Clerk
Missouri Court of Appeals
Civil Courts Building
12th & Market Street
St. Louis, Missouri 63101

Weldon W. Perry, Jr.
WELDON W. PERRY, JR.

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
JEFFERSON CITY, MISSOURI
65101

THOMAS F. SIMON
CLERK

TELEPHONE
(314) 751-4144

November 14, 1979

Hon. John Ashcroft
ATTORNEY GENERAL
Supreme Court Building
Jefferson City, MO 65101

In re: State of Missouri vs. Willie Mae Johnson - No. 61694

Dear Sir:

This is to advise that the Court this day entered an order in the above-entitled cause, a certified copy of which is herewith attached.

Very truly yours,

Thomas F. Simon

Clerk

Attachment
cc: Robert C. Babione

EN BANC

State of Missouri, Respondent,

vs. TRANSFER

Willie Mae Johnson, Appellant.

THE STATE OF MISSOURI

to

the Judges of the Missouri Court of Appeals, EASTERN District,

GREETINGS:

Now at this day, on consideration of the application of respondent, State of Missouri,

to transfer the above-entitled cause, No. 61694 , from the EASTERN DISTRICT, Missouri Court of Appeals, it is ordered that said application be, and the same is hereby sustained.

Therefore, you, as Judges of the Missouri Court of Appeals, EASTERN DISTRICT, are ordered to send to this Court on or before the 14th day of December, 19 79 , a full and complete transcript of the record and proceedings in your court, together with copies of all records and briefs filed in your court in the said cause.

It is further ordered that you recall your mandate, if the same has issued, and that you take no further action in this case.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the Seal of said Court, at my office in the City of Jefferson, this 14th day of November, 19 79 .

Thomas F. Simon
Clerk, Supreme Court of Missouri

by Jim Gallamore, D.C.

ROBERT G. DOWD
JUDGE
GERALD M. SMITH
JUDGE
JOHN J. KELLY, JR.
JUDGE
GEORGE F. GUNN, JR.
JUDGE
JOSEPH G. STEWART
JUDGE
JAMES R. REINHARD
JUDGE
ALBERT J. STEPHAN, JR.
JUDGE
ROBERT O. SNYDER
JUDGE
ROBERT E. CRIST
JUDGE
HAROLD L. SATZ
JUDGE
JAMES A. PUDLOWSKI
JUDGE

Missouri Court of Appeals

EASTERN DISTRICT
CIVIL COURTS BUILDING ST. LOUIS, MO. 63101

OFFICE OF THE CLERK
AREA CODE 314
622-4324

November 19, 1979

Mr. Paul Robert Otto
Assistant Attorney General
Chief Counsel-Criminal Division
Appeal Box No. 899
Jefferson City, Mo. 65102

Mr. George A. Peach
Circuit Attorney
320 Municipal Courts Building
St. Louis, Mo. 63103

Mr. Robert C. Babione
Public Defender
200 Municipal Courts Building
St. Louis, Mo. 63103

No. 39242 -- State of Missouri, Respondent, vs.
Willie Mae Johnson, Appellant.

Gentlemen

In compliance with an order made by the Supreme Court on November 14, 1979, transferring the above styled case to said Court, the file and papers, together with the transcript of record (3 volumes), 11 copies of appellant's brief, 10 copies of respondent's brief.

Yours truly,

Michael E. Gans By JG

Michael E. Gans, Acting Clerk

gb

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
JEFFERSON CITY, MISSOURI
65101

THOMAS F. SIMON
CLERK

TELEPHONE
(314) 751-4144

April 3, 1980

Ms. Christelle Adelman-Adler
Assistant Public Defender
1320 Market Street
St. Louis, MO 63103

Mr. Weldon W. Perry, Jr.
Assistant Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Willie Mae Johnson
No. 61694

Gentlemen:

This is to advise that the court this day handed down the opinion attached herewith in the above-entitled cause.

Motions for rehearing must be filed within 15 days from this date (Rule 84.17). The provisions of Rule 44.01(e) do not apply to extend the time for filing motions for rehearing.

Yours very truly,

THOMAS F. SIMON

Mary Elizabeth McHaney

Mary Elizabeth McHaney
Deputy Clerk, Court en Banc

Att.

Supreme Court of Missouri

en banc

STATE OF MISSOURI,)
Respondent,)
vs.) No. 61694
WILLIE MAE JOHNSON,)
Appellant.)

APR 8 1980
IN OFFICE OF
CLERK SUPREME COURT

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
DIVISION NO. 19
HONORABLE CLYDE S. CAHILL, JUDGE

PER CURIAM

This case involves double jeopardy.

Appellant was tried in January 1977 of murder in the first degree of Gladys Gregg and robbery of Gladys Gregg. Appellant was acquitted of the charge of murder. The jury could not reach a verdict on the robbery charge and a mistrial was declared. In March 1977 appellant was tried again for the robbery of Gladys Gregg. She was convicted of robbery by the jury and was sentenced to ten years' imprisonment. Appellant appealed to the Eastern District of the Missouri Court of Appeals where the judgment of conviction was reversed and appellant was ordered discharged. The cause was then transferred to this Court. We decide it "the same as on original appeal." Mo. Const. art. V, § 10.

The "substitute information in lieu of indictment" upon which appellant was tried the first time charged that she, acting with another, "feloniously, willfully, premeditatedly, deliberately, on purpose and of her malice aforethought did make an assault upon one Gladys Gregg, with a plastic bag, and then and there feloniously, willfully, premeditatedly, deliberately, on purpose and of her malice

aforethought did strangle and suffocate the body of the said Gladys Gregg * * *" thus causing her death. However, at the conclusion of the trial and over defense counsel's objection, the trial court refused to give a "conventional murder first degree" instruction. Rather, the murder charge was submitted to the jury under the felony-murder doctrine, thus directing the jury to find appellant guilty of the murder of Gladys Gregg if it found that she caused the death of the victim "and, Second, that she did so in robbing Gladys Gregg, * * *." As pointed out above, appellant was acquitted of the murder charge.

After a mistrial was declared as to the charge of robbery of Gladys Gregg, appellant filed a motion to dismiss the charge, alleging that retrial on such charge would violate her right against double jeopardy. The motion was denied by the trial court. After the second trial, the point was properly preserved in the motion for new trial.

It is clear that appellant cannot again be tried for the offense of murder, of which she was acquitted. The question is whether appellant may be retried for robbery, the underlying felony, on which the jury became deadlocked and a mistrial was declared.

In the context of this case, there are three aspects of double jeopardy which must be considered: 1) multiple punishment; 2) multiple prosecution; and 3) collateral estoppel of issues previously determined.

First, there is no danger of multiple punishment here, where no conviction as to either offense was returned.

Second, although the multiple prosecution problem is applicable here to the robbery offense, case law consistently holds that a defendant is entitled to immunity from reprosecution only if he can show that the mistrial was intentionally triggered by the state for the tactical purpose of strengthening the prosecution's case. United States v. Dinitz, 424 U.S. 600, 611 (1976). Since a hung jury cannot be attributed to bad faith on the part of the prosecution, a retrial is permissible. United States v. Sanford et al., 429 U.S. 14 (1976); State v. Berry, 298 S.W.2d 429 (Mo. 1957); State v. Sales, 558 S.W.2d 302 (Mo. App. 1977).

The crucial question on the collateral estoppel issue is: What issues does a general verdict of acquittal of felony-murder resolve? See Turner v. Arkansas, 407 U.S. 366, 369 (1972). It cannot be convincingly argued that the jury's acquittal of the murder charge impliedly acquitted appellant of the robbery, as in Ashe v. Swenson, 397 U.S. 436 (1969). Distinguishing this case from Ashe is the fact that here it cannot be said that there was only a "single rationally conceivable issue in dispute before the jury." Id. at 445. In light of the inability of the jury in the January 1977 trial to return a verdict on the robbery charge, we conclude that its acquittal of murder under the felony-murder doctrine was for a reason, or on an issue, not related to robbery.

Appellant next contends that there was error in the trial court's overruling her motion for judgment of acquittal at the close of the case, i.e., that a submissible case of robbery first degree had not been made against appellant.

Briefly, the evidence adduced consisted of 1) several fingerprints identified as appellant's lifted from various objects at the decedent's premises; 2) testimony of a neighbor of the victim that one Sandra Ross, admittedly appellant's lover, had been seen entering and leaving the decedent's premises on the night in question, and that concurrently a dark colored car containing two other unidentified occupants had been observed beside her apartment building; 3) the subsequent arrest of Sandra Ross and appellant's brother in a maroon and black car, which contained two pillowcases full of silverware, all identified as belonging to the decedent; and 4) the flight of appellant when she was much later approached by police officers.

It is obvious that the state's case consisted of, and the jury's conviction was based on, circumstantial evidence. Appellant made a statement to police after her arrest that she was unfamiliar with decedent's residence and did not recognize a photo of it. At trial, however, appellant attempted to lessen the impact of the damning

fingerprint evidence by suggesting that since she was Sandra Ross's lover and frequent companion, it would not be unlikely that she might have accompanied Ross to decedent's premises in the past, since Ross was acquainted with her. Although no evidence to this effect was put on, appellant argues that the state has not met the test of sufficiency required when circumstantial evidence is relied on: that the facts and circumstances relied upon by the state to establish guilt must be inconsistent and irreconcilable with a hypothesis of defendant's innocence. See State v. Thomas, 452 S.W.2d 160 (Mo. 1970). We note, however, that this test must be realistically tempered in its application; the circumstances need not demonstrate the impossibility of innocence; the mere existence of other possible hypotheses is not enough to remove the case from the jury. See State v. Franco, 544 S.W.2d 533 (Mo. banc 1976), cert. denied, 431 U.S. 957 (1977).

State v. Gales, 507 S.W.2d 35 (Mo. App. 1974) is a case involving facts very similar to those presented here. The victim lived alone and was found dead. She was bound, her apartment was in disarray, and defendant's fingerprints were found on her jewelry box. Articles of personal property which had been in defendant's possession were identified as belonging to the victim. Similarly, in this case no eyewitnesses to the crime were present, the victim was found dead, bound and gagged, the premises were in disarray, and appellant's fingerprints were found on objects therein. Objects stolen from decedent were found in the possession of appellant's lover and appellant's brother, and a neighbor had seen three people near the house on the night that the victim was last seen alive.

> "Much of the evidence in the instant case is circumstantial. But, the rule in Missouri is, that in order to convict upon circumstantial evidence, the circumstances must be consistent with each other and with the theory of the defendant's guilt and inconsistent with innocence, and must exclude every other reasonable hypothesis except for guilt. * * *.
>
> " * * * Proof that fingerprints found in the place

where a crime is committed under such circumstances that they could only have been impressed at the time the crime was committed--corresponding to those of the accused--may be sufficient proof of identity to sustain a conviction." Id. at 37. We conclude that appellant's claim that the evidence was insufficient for submission to the jury is without merit.

Finally, appellant contends that the court erred in overruling appellant's motion to suppress numerous pieces of silverware and two pillow slips obtained by search and seizure without a warrant and allegedly without other lawful authority. The state submits that appellant has no standing to raise such a claim, and that in any event, the arresting officer had probable cause to stop the vehicle in question. The underlying facts giving rise to appellant's constitutional claims are that a neighbor of the decedent testified that she saw a dark colored automobile occupied by two persons parked near the decedent's house on the night of the murder. On the day after the decedent was found dead, detectives of the St. Louis Police Department were maintaining surveillance of appellant Willie Mae Johnson's residence. As they watched, a man and a woman--appellant's brother, Ronnie Johnson, and Sandra Ross--walked out of the house suspiciously carrying pillowcases filled with items and entered an automobile. Since neither of the persons was the object of the surveillance, the detectives did not confront them but placed a radio call to Sergeant Charles McCrary who was parked several blocks away as a backup to the detectives. At their request, McCrary stopped the vehicle, a black over maroon 1968 Pontiac, driven by Ronnie Johnson. On the floorboard in front of Sandra Ross were two pillowcases containing numerous articles of silverware in plain view. McCrary seized the silverware and took Ronnie Johnson and Sandra Ross to police headquarters for questioning. The pillowcases were identified by Mrs. Gregg's maid as belonging to the victim. The silverware in the pillowcases was identified by both the maid and Mrs. Gregg's stepson as belonging to Mrs. Gregg.

"[T]here is no standing to contest a search and seizure [unless

appellant (a) was] on the premises at the time of the contested search and seizure; (b) alleged [a] proprietary or possessory interest in the premises; [or] (c) [was] charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." (Emphasis added.) Brown v. United States, 411 U.S. 223, 229 (1973). The second situation is the only one relevant here. Since title is no longer the ratio decidendi for standing, Jones v. United States, 362 U.S. 257 (1960), more subtle proprietary and possessory interests must be examined to determine this status.

Appellant's father testified at the suppression hearing that he owned the Pontiac and that it was purchased for the use of his five children, including appellant. However, appellant did not live with her parents.

Both parties cite In re J.R.M., 487 S.W.2d 502 (Mo. banc 1972) on the issue of proprietary or possessory interest. The defendant there was a juvenile; his father owned a Corvair which the defendant had the right to use at any time. He had his own keys to the car; he regularly drove it to school, and he was included in the insurance coverage on the car. Furthermore, he lived with his parents where the car was kept. The court concluded that the defendant "used the car much as he would have done if title had been in him," id. at 509, and found the above factors sufficient to confer standing.

In State v. Csolak, 571 S.W.2d 118 (Mo. App. 1978), the court applied the "case by case approach" of In re J.R.M. "which requires an examination of the facts of each case 'to determine the relationship of defendant to the premises and property and to determine whether defendant was entitled to and did have a reasonable expectation that the property would be free from governmental intrusion other than by a proper and lawful search and seizure.'" Id. at 121. See Mancusi v. DeForte, 392 U.S. 364, 368 (1968), where this language originated. The appellant in Csolak likewise had his own keys to the car, which was owned by his father, and "used it regularly as if it were his own."

571 S.W.2d at 121. The opinion also stressed the fact that at the time of the search, the car was parked in front of appellant's residence, which was different from his father's. The court indicated that this demonstrated that the car was in appellant's possession at the time of the search.

None of the elements stressed by these cases were present in this case. Only appellant's father had a key to the Pontiac. Appellant's right to use the car was vested equally with her four other brothers and sisters, in addition to her parents, and the latter made the decision, if there was a conflict, as to who would have use of the vehicle. There was no showing that appellant was listed as an insured on the Pontiac's insurance policy. Importantly, appellant was not in possession of the car at the time of the questioned seizure. Further, there was testimony that appellant rarely used the car. It was kept at her father's home, while she lived elsewhere at another residence also owned by her father.

It is clear that suppression of evidence can only be sought by a person who has sufficient connection with the searched vehicle or premises that his rights were violated; it is not enough that a person was injured because of the damaging evidence obtained as a result of a search. See Alderman v. United States, 394 U.S. 165 (1969); State v. Drake, 512 S.W.2d 166, 170 (Mo. App. 1974). This issue is ruled against appellant. Therefore, we find it unnecessary to determine whether the arresting officers had probable cause to stop the vehicle in question.

The judgment is affirmed.

Rendlen, Welliver, Morgan, and Higgins, JJ., concur; Bardgett, C.J., concurs in separate concurring opinion filed; Donnelly, J., dissents in separate dissenting opinion filed; Seiler, J., dissents and concurs in separate dissenting opinion of Donnelly, J.

Supreme Court of Missouri

en banc

DUPLICATE
OF FILING ON
APR - 8 1980
IN OFFICE OF
CLERK SUPREME COURT

STATE OF MISSOURI,
Respondent,
vs.
WILLIE MAE JOHNSON,
Appellant.

No. 61694

CONCURRING OPINION

I concur in the per curiam opinion in this case but do so on rather narrow grounds. This case involves an original prosecution where the defendant was charged with murder in the first degree of James Bell, murder in the first degree of Gladys Gregg, robbery of James Bell, and robbery of Gladys Gregg. These charges were brought under § 559.010, RSMo 1969, which is our old murder-in-the-first-degree statute and permits murder in the first degree to be submitted to the jury upon evidence that the homicide was committed in the perpetration or attempt to perpetrate certain felonies, among which is robbery. The murder submission in this case was made under the so-called felony-murder rule, which, in order to convict of murder in the first degree, required a finding by the jury that the defendant was engaged in the felony of robbery and in the course of the robbery killed the deceased. A failure to find the defendant killed the deceased in the course of the robbery would require a jury verdict of not guilty on the charge of murder in the first degree. However, in my opinion it would not preclude the jury from finding that the defendant was guilty of the robbery.

In this case the jury found defendant not guilty of both counts of murder. The state dismissed the charge of robbery of James Bell during the course of the trial, after jeopardy attached, which would preclude a reprosecution for that offense. However, the charge of robbery of Gladys Gregg was submitted to the jury and the jury returned no verdict (hung jury). Of necessity, the court then declared a mistrial and discharged the jury.

In this case we see an instance where the prosecutor has charged and tried the defendant for all of the crimes (robbery and murder) arising out of that particular event which were available for prosecution under the law and rules of this Court. What we do not have is an instance where the prosection withheld part of the matter, i.e., the robbery, so as to prosecute for the robbery in the event that the jury acquitted of the felony murder based upon the robbery. Nor do we have an instance where the prosecutor undertook to split up the original crime (murder in the first degree based on the robbery) and later prosecute it piecemeal. Therefore I believe that the original submission for felony murder was properly submitted as a homicide committed in the course of the felony of robbery and that the jury would have been permitted to find defendant not guilty of the first-degree murder and guilty of the robbery. At the time this case was tried the instructions were submitted for murder in the first degree as a homicide committed while in the course of the robbery, and independently and conjunctively for the underlying robbery. In my opinion the proscription against double punishment would have precluded the jury and does preclude the jury from finding the defendant guilty of both robbery and murder in the first degree premised on the underlying felony of robbery, and then assessing a punishment for each of those crimes.

It is my opinion that State v. Morgan, 592 S.W.2d 796 (Mo. banc 1980), held in essence that if the felony relied upon to obtain a conviction of first-degree

murder, where it is alleged that the homicide occurred during the course of the felony, results in a conviction of first-degree murder, the underlying felony has been "used up" and cannot become the basis of another conviction or another punishment. This is not, in the ordinary sense, a lesser-included-offense situation. It is simply a situation created by the legislature in enacting a statute, which in effect declares that if a person in committing a particular type of felony kills someone in the course of the felony the killing is murder in the first degree. It is therefore my opinion that the felony of robbery should have been submitted as an alternative to felony murder in the first degree to be considered by the jury only in the event that they found defendant not guilty of first-degree murder premised on that robbery.

Had the state not proceeded on the underlying felony in this original prosecution but only on the charge of first-degree murder premised on the commission of the underlying felony, then, in my opinion, the state would have tried to prosecute the defendant piecemeal. See State v. Richardson, 460 S.W.2d 537, 539 (Mo. banc 1970).

Of course there will be instances where, under the facts of a given case, the state will not be able to proceed with the prosecution of the robbery because of collateral estoppel under Ashe v. Swenson, 397 U.S. 436 (1969), as well as instances where, under Rule 24.04 (a), the underlying felony cannot be charged. However, in the instant case the evidence of the offenses was circumstantial and it cannot be said that the "real" issue was whether or not the defendant was present at the scene, as was the case in Ashe v. Swenson, supra.

I therefore concur in the affirmance of the conviction.

John E. Bardgett, Chief Justice

Supreme Court of Missouri

en banc

STATE OF MISSOURI,

Respondent,

vs.

WILLIE MAE JOHNSON,

Appellant.

No. 61694

DUPLICATE
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CONCURRING OPINION

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In this case the jury found defendant not guilty of both counts of murder. The state dismissed the charge of robbery of James Bell during the course of the trial, after jeopardy attached, which would preclude a reprosecution for that offense. However, the charge of robbery of Gladys Gregg was submitted to the jury and the jury returned no verdict (hung jury). Of necessity, the court then declared a mistrial and discharged the jury.

In this case we see an instance where the prosecutor has charged and tried the defendant for all of the crimes (robbery and murder) arising out of that particular event which were available for prosecution under the law and rules of this Court. What we do not have is an instance where the prosection withheld part of the matter, i.e., the robbery, so as to prosecute for the robbery in the event that the jury acquitted of the felony murder based upon the robbery. Nor do we have an instance where the prosecutor undertook to split up the original crime (murder in the first degree based on the robbery) and later prosecute it piecemeal. Therefore I believe that the original submission for felony murder was properly submitted as a homicide committed in the course of the felony of robbery and that the jury would have been permitted to find defendant not guilty of the first-degree murder and guilty of the robbery. At the time this case was tried the instructions were submitted for murder in the first degree as a homicide committed while in the course of the robbery, and independently and conjunctively for the underlying robbery. In my opinion the proscription against double punishment would have precluded the jury and does preclude the jury from finding the defendant guilty of both robbery and murder in the first degree premised on the underlying felony of robbery, and then assessing a punishment for each of those crimes.

It is my opinion that State v. Morgan, 592 S.W.2d 796 (Mo. banc 1980), held in essence that if the felony relied upon to obtain a conviction of first-degree

murder, where it is alleged that the homicide occurred during the course of the felony, results in a conviction of first-degree murder, the underlying felony has been "used up" and cannot become the basis of another conviction or another punishment. This is not, in the ordinary sense, a lesser-included-offense situation. It is simply a situation created by the legislature in enacting a statute, which in effect declares that if a person in committing a particular type of felony kills someone in the course of the felony the killing is murder in the first degree. It is therefore my opinion that the felony of robbery should have been submitted as an alternative to felony murder in the first degree to be considered by the jury only in the event that they found defendant not guilty of first-degree murder premised on that robbery.

Had the state not proceeded on the underlying felony in this original prosecution but only on the charge of first-degree murder premised on the commission of the underlying felony, then, in my opinion, the state would have tried to prosecute the defendant piecemeal. See State v. Richardson, 460 S.W.2d 537, 539 (Mo. banc 1970).

Of course there will be instances where, under the facts of a given case, the state will not be able to proceed with the prosecution of the robbery because of collateral estoppel under Ashe v. Swenson, 397 U.S. 436 (1969), as well as instances where, under Rule 24.04 (a), the underlying felony cannot be charged. However, in the instant case the evidence of the offenses was circumstantial and it cannot be said that the "real" issue was whether or not the defendant was present at the scene, as was the case in Ashe v. Swenson, supra.

I therefore concur in the affirmance of the conviction.

John E. Bardgett, Chief Justice

Supreme Court of Missouri

en banc

STATE OF MISSOURI,)
)
Respondent,)
)
vs.) No. 61694
)
WILLIE MAE JOHNSON,)
)
Appellant.)

IN OFFICE OF
CLERK SUPREME COURT

DISSENTING OPINION

In State v. Morgan, 592 S.W.2d 796, 803 (Mo. banc 1980), this Court held that "the felony relied on to prove intent in a felony-murder case is a lesser-included offense of the murder"--that the felony relied on to prove intent in a felony-murder case and the murder are, for constitutional purposes, the same offense.

Article I, § 19 of the Missouri Constitution provides that no person shall "be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; * * *." (Emphasis supplied).

Appellant was tried in January 1977 for the murder of Gladys Gregg. The felony relied on to prove intent in the murder case was robbery. Appellant was acquitted on the murder charge. She could not thereafter be convicted of robbery because, under Morgan, supra, the murder (submitted under the felony-murder doctrine) and the robbery were the same offense and she had been acquitted by a jury of the murder. Under the Missouri Double Jeopardy Clause, the conviction of robbery cannot be permitted to stand.

I would order the judgment of conviction reversed and the appellant discharged.

I respectfully dissent.

Robert T. Donnelly, Judge

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

TELEPHONE
(314) 751-4144

April 23, 1980

Mr. Robert C. Babione
Public Defender
1320 Market Street
St. Louis, MO 63101

In re: State of Missouri vs. Willie Mae Johnson - No. 61694

Dear Mr. Babione:

This will acknowledge receipt of Appellant's Motion for Rehearing filed this date in the above-entitled cause showing service.

Very truly yours,

THOMAS F. SIMON

Jan Gallamore

Jan Gallamore
Deputy Clerk

IN THE

SUPREME COURT OF MISSOURI

STATE OF MISSOURI, Respondent	)	
v.	)	
WILLIE MAE JOHNSON Appellant	)	No. 61694

MOTION FOR REHEARING

Comes now Willie Mae Johnson, Appellant, and informs the Court that:

1. Appellant was convicted by a jury of Robbery First Degree on March 17, 1977. This conviction resulted upon presentation of the same facts and evidence which resulted in Appellant's previous acquittal of felony-murder committed during the perpetration of the robbery. Appellant's counsel timely filed a Motion to Dismiss on double jeopardy grounds which Motion was denied. On May 2, 1977, the Honorable Clyde Cahill of the Circuit Court of the City of St. Louis, Missouri, sentenced appellant to 10 years in the Missouri Department of Corrections. Appellant appealed from this judgment.

2. On June 26, 1979, the Missouri Court of Appeals, St. Louis District, reversed the conviction indicating that this was a double jeopardy situation in which Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054 (1977), mandated discharge of the defendant.

3. The cause was transferred to the Supreme Court and on April 8, 1980, the holding of the Court of Appeals was reversed and the conviction affirmed holding that the acquittal of felony-murder did not invalidate the subsequent conviction of the robbery.

4. Appellant seeks to call the Court's attention to certain matters of fact and law which its opinion has overlooked and misinterpreted:

a. In State v. Morgan, 592 S.W.2d 796, 803 (Mo. banc 1980), this Court held that "the felony relied on to prove intent in a felony-murder case is a lesser-included offense of the murder"--that the felony relied on to prove intent in a felony-murder case and the murder are, for constitutional purposes, the same offense.

The Missouri Constitution provides that no person shall "be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury."

Appellant was tried in January, 1977, for the murder of Gladys Gregg. The felony relied on to prove intent in the murder case was robbery. Appellant was acquitted on the murder charge. She could not thereafter be convicted of robbery because, under Morgan, supra, the felony-murder and the robbery were the same offense and she had been acquitted by a jury of the murder. Under the Missouri Double Jeopardy Clause, the conviction of robbery should not stand.

b. In Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed. 1054 (1977), the United States Supreme Court held that when in a felony-murder situation, conviction of the murder cannot be had without conviction of the lesser crime, robbery. The Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one. This must necessarily be true after an acquittal. A person who is tried and acquitted for a crime which has various incidents in it, cannot be tried a second time for one of those incidents without being twice put in jeopardy for the same offense. The Court's opinion fails to deal with this problem.

In conclusion, appellant prays the Court to rehear this cause in order that a manifest injustice be rectified.

Respectfully submitted,

CHRISTELLE ADELMAN-ADLER
Assistant Public Defender

A copy of the foregoing motion has been sent to the office of the Attorney General, State of Missouri, this 22 day of April, 1980.

Attorney for Appellant

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE

UNITED STATES

_____ TERM, 1980

ORIGINAL COPY

No. 80-5179

WILLIE MAE JOHNSON,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STEVEN W. GARRETT
Assistant Attorney General
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TABLE OF AUTHORITIES

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Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977);

Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973);

Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1891);

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State v. Sales, 558 S.W.2d 302 (Mo.App., Spr. D. 1977);

United States v. Sandford, et al., 429 U.S. 14, 97 S.Ct. 20, 50 L.Ed.2d 17 (1976);

Ward v. State, 451 S.W.2d 79 (Mo. 1970);

Whalen v. United States, ___ U.S. ___, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980).

IN THE

SUPREME COURT OF THE

UNITED STATES

_____ TERM, 1980

No.

WILLIE MAE JOHNSON,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

Pursuant to Supreme Court Rule 34.2, respondent finds that appellant's Statement of Facts is accurate and has not omitted any material matters.

ARGUMENT

Petitioner was tried in January of 1977 of both first degree murder (felony murder) and robbery first degree (the predicate felony) of one Gladys Gregg. Thereafter, the jury acquitted petitiioner of the murder charge and failed to reach a verdict on the robbery charge. At that point, the trial judge declared a mistrial. In March of 1977, petitioner was tried again for the robbery of Gladys Gregg. She was convicted of robbery by the jury and was sentenced to ten years imprisonment.

Petitioner alleges that the jury's original acquittal on the felony murder charge resulted in the jury necessarily finding that she caused the victim's death as the result of robbing her. Consequently, petitioner concludes that the doctrine of Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), mandates reversal.

Respondent submits that, based on the instructions submitted by petitioner (see Appendices III and IV), the jury acquitted petitioner of the felony murder for one of two reasons. Either it found that the petitioner did not cause the death of the victim or that she did not do so in robbing the victim. In regard to the robbery charge, the jury was simply unable to reach a verdict. According to appellant, this court's per curiam opinion in Harris v. Oklahoma, supra, precluded her retrial on the robbery charge because the double jeopardy clause bars prosecution for the lesser crime after conviction of the greater one.

Respondent submits that Harris v. Oklahoma, supra, determined only that, when a person is convicted of a greater crime (murder), he cannot then be retried for a lesser included offense (robbery with firearms) without violating the constitutional guarantee against double jeopardy. Harris does not even purport to proscribe subsequent prosecution of an accused for the underlying felony (robbery) following the accused's acquittal of felony murder. This is especially true when, as here, prosecution for the underlying felony was attempted in the same proceeding as that of felony murder. See, Whalen v. United States, ___ U.S. ___, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). The only reason for the retrial was due to the jury's inability to reach the verdict on the charge of robbery at the original proceeding.

It is a well settled proposition that retrial of a defendant, following a prior mistrial on the same charge due to the jury's inability to reach a verdict, does not constitute

double jeopardy unless the trial court abused its discretion in granting the mistrial. Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1891); Durham v. Wyrick, 545 F.2d 41, 43-44 (8th Cir. 1976); Ward v. State, 451 S.W.2d 79, 81-82 (Mo. 1970). See also, Illinois v. Somerville, 410 U.S. 458, 467-468, 93 S.Ct. 1066, 35 L.Ed.2d 425, 433-434 (1973), wherein the court expressed disdain at the practice of a trial court declaring a mistrial for the sole purpose of allowing a prosecutor to strengthen the state's case but recognized that the granting of a mistrial, following a jury's inability to reach a verdict, rested within the discretion of the trial court to be disturbed on appeal only in the event of abuse.

Furthermore, the case law consistently holds that a defendant is entitled to immunity from re-prosecution only if he can show that the mistrial was intentionally triggered by the state for the tactical purpose of strengthening its case. United States v. Sanford, et al., 429 U.S. 14, 97 S.Ct. 20, 50 L.Ed.2d 17 (1976); State v. Berry, 298 S.W.2d 429 (Mo. 1957); State v. Sales, 558 S.W.2d 302 (Mo.App., Spr. D. 1977). It is submitted that the state's retrial of appellant, after a prior mistrial for robbery and under the circumstances of this case, did not constitute a violation of appellant's constitutional guarantee against double jeopardy.

The question remains, however, as to the effect of the doctrine of collateral estoppel on petitioner's case. Respondent submits that it cannot be convincingly argued that the jury's acquittal of the murder charge impliedly acquitted appellant of the robbery as was the case in Ash v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1969). The feature distinguishing petitioner's case from Ash is the fact that, in petitioner's case, it cannot be said that

there was only a "single rationally conceivable issue in dispute before the jury." Id. 397 U.S. at 445. In light of the jury's inability to return a verdict on the robbery charge at petitioner's January, 1977, trial, respondent submits that the jury's acquittal of felony murder, during the same criminal proceeding, was manifestly, for a reason or an issue, not related to the robbery. If this were not the case, then quite clearly the jury would have returned with an acquittal on the robbery charge.

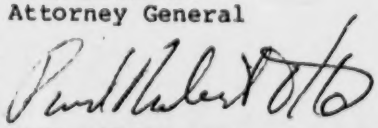
Petitioner grossly misconstrues the law in regard to double jeopardy. Although she is correct in alleging that each and every element of the crime of robbery was submitted to the jury at the first trial, in connection with the felony murder charge, she fails to understand that the jury's acquittal on felony murder did not preclude its consideration of the predicate felony alone as a substantive offense. Since the jury's acquittal on the felony murder could not have logically been predicated on its feeling that petitioner did not commit the robbery, the state was not collaterally estopped from submitting robbery to the jury or retrying on robbery after mistrial. The state was not precluded from retrying on the murder charge because the original mistrial, due to a hung jury, cannot be attributed to bad faith on the part of the prosecution.

CONCLUSION

WHEREFORE, respondent respectfully submits that the petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN ASHCROFT
Attorney General



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May 13, 1980

Mr. Robert C. Babione
Public Defender
1320 Market Street
St. Louis, MO 63101

In re: State vs. Willie Mae Johnson - No. 61694

Dear Mr. Babione:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Appellant's motion for rehearing overruled."

Very truly yours,

Thomas F. Simon

Clerk.

cc: Attorney General